Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1997

UNITED WE STAND, AMERICA, NEW YORK INC., a N.Y. Corporation, and ALEX RODRIGUEZ,
PETITIONERS

v.

UNITED WE STAND AMERICA, a D.C corporation,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state electoral activities (circulating nominating petitions, selecting candidates, announcing a political platform, announcing the organization of a political party and selecting the name of a state political party organization) are services within the meaning of the Lanham Act?

2. Whether state electoral activities (circulating nominating petitions, selecting candidates, announcing a political platform, announcing the organization of a political party and selecting the name of a state political party organization) constitute economic activities that substantially affects interstate commerce?

PARTIES TO THE PROCEEDINGS

Petitioners are United We Stand, America New York Inc. an active New York corporation with no parent companies nor nonwholly owned subsidiaries and Alex Rodriguez, the President of United We Stand, America New York Inc., individually, and d/b/a United We Stand, America New York Inc.

Respondent United We Stand America, Inc. is a District of Columbia corporation that was dissolved in December 1996.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners United We Stand, America New York Inc. and Alex Rodriguez respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at *United We Stand America, Inc. v. United We Stand, America New York Inc.*, 128 F.3d 86 (2d Cir. 1997) (Appendix A). The order of the Court of Appeals denying the petition

for rehearing is unreported (Appendix B). The opinion of the United States District Court for the Southern District of New York is reported at *United We Stand America, Inc. v. United We Stand America New York Inc.*, 941 F.Supp. 39 (S.D.N.Y. 1996) (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on October 15, 1997. The Court of Appeals denied a timely petition for rehearing on December 2, 1997 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Article I, Section 8 provides:

> The Congress shall have power...To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Lanham Act (15 U.S.C. § 1114(1)) provides:

> Any person who shall, without the consent of the registrant - (a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or to cause mistake, or to deceive..., shall be liable in a civil action by the registrant for the remedies hereinafter provided.

N.Y. Election Law § 1-104(3) provides:

> The term "party" means any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor.

N.Y. Election Law § 2-124(2) provides:

> The name of a party shall be in the English language and shall not include the words "American", "United States", "National", "New York State", "Empire State", or any abbreviation thereof, nor the name or

part of the name, or an abbreviation of the name, of an existing party. The emblem chosen may be a star, an animal, an anchor, or any other proper symbol, but may not be the same as or similar to any emblem, insignia, symbol or flag used by any religious emblem, insignia, symbol or flag, nor the portrait of any person, nor the representation of a coin or of the currency of the United States. The name and emblem chosen shall not be similar to or likely to create confusion with the name or emblem of any other existing party or independent body.

STATEMENT

A. Statement of Facts

The Perot Petition Committee was the principal campaign committee duly formed pursuant to federal election law for the reporting of receipts and expenditures of money for the 1992 presidential campaign of Ross Perot. By August 11, 1992, this principal campaign committee adopted and began using "UNITED WE STAND AMERICA" to advertise its "services." On October 2, 1992, the Perot Petition Committee changed its name and became Perot '92. Perot '92 continued the work of Perot Petition Committee and it continued to use, and asserted "ownership" of the phrase "UNITED WE STAND AMERICA" in connection with its "services." On October 7, 1992, defendant United We Stand, America New York Inc. ("UWSANY") was incorporated in New York as a domestic not-for-profit corporation. The purpose for which the corporation was formed was to create, form and establish a support organization for the candidacy of Ross Perot for President; to solicit, collect and oth-

erwise raise money to support and further the candidacy of Ross Perot; to receive, establish, maintain a fund or funds of real and personal property exclusively for the candidacy of Ross Perot. Plaintiff United We Stand America, Inc., was incorporated in Washington, D.C. on November 24, 1992. On November 25, 1992, Perot '92 assigned any right, title and interest it had in "UNITED WE STAND AMERICA" to the newly created United We Stand America, Inc.

After the 1992 presidential campaign, defendant UWSANY began preparations for the 1994 gubernatorial campaign in New York. In connection with its activities in 1994, defendant UWSANY announced that it was selecting candidates for elective office in New York, that it would attempt to place candidates on the ballot under the name "United We Stand," that it planned to undertake a petition drive, circulating petitions to the public with the name United We Stand, America New York appearing thereon, that it is a political party, and that it has issued a party platform.

Plaintiff feared that if the petition drive occurred using any variation of plaintiff's service mark, the public would be misled to believe that UWSANY is connected to Ross Perot and plaintiff, confusion would be created and that votes may be miscast.

This action followed. Plaintiff brought suit against defendants on June 27, 1994 and immediately thereafter sought injunctive relief to prevent the aforesaid political activities from taking place under the name "UNITED WE STAND AMERICA" or any variation thereof.

B. The Proceedings Below

An injunction was entered in 1994 against defendants circulation of nominating petitions for New York governor. Thereafter, after almost a year of obtaining, then losing, counsel, UWSANY

was defaulted for failure to hire an attorney to represent it. Plaintiff moved for summary judgment. Defendant Rodriguez proceeded *Pro Se*. Defendant UWSANY obtained counsel in 1995 and, thereafter, made a motion to vacate the default judgment. The motion to vacate the default judgment and the motion for summary judgment were consolidated for decision. On October 7, 1996, the District Court (Knapp, S.J.) denied the motion to vacate the default and granted summary judgment to plaintiffs.

Defendants appealed. In December 1996, plaintiff filed dissolution papers with the Division of Corporations of the District of Columbia and its corporate existence ceased. Defendants discovered this fact one week before oral argument. At oral argument, on June 3, 1997, the Court of Appeals was informed of the dissolution by defendants' attorney who had a certified copy of the certificate of dissolution with him in court. Defendants' counsel suggested that the case may be moot based upon plaintiffs' dissolution. Plaintiffs attorney was not aware that its client had been dissolved. On October 15, 1997, the Court of Appeals rendered its decision affirming the judgment of the District Court.

Thereafter petitioner timely sought rehearing. On December 2, 1997, defendants' request for rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted Because the Opinion Below Conflicts with this Court's Decision in United States v. Lopez (514 U.S. 549) and Takes an Expansive View of the Scope of the Lanham Act That Infringes on the Right of States to Regulate State Electoral Activity.

Petitioner submits that this case presents the Court with an

ideal opportunity to further expound on the delineation of power in our system of dual sovereigns. In its decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down the *Gun Free School Zone Act* that made it a federal offense to be in possession of a firearm near a school. The Court found that the states possessed primary authority for defining and enforcing the criminal law, *id.* at 561, n.3, and that Congress had exceeded its authority under the Commerce Clause when it enacted the gun provision where there was no economic activity substantially effecting interstate commerce. Id. at 563.

Now comes this present case. Plaintiff obtained injunctive relief from a federal court barring the defendants from engaging in certain state electoral activities under a name for which plaintiffs previously had obtained a service mark registration. Defendants contend that the selection of a name by a state political party organization is an area wherein the State has primary authority. New York has a comprehensive election law, *see, Chambers v. I. Ben Grossman Ass'n*, 58 N.Y.S.2d 637, 639 (Sup.Ct. Bronx Co. 1945), which *inter alia* controls the use of political party names and emblems. *See* N.Y. Election Law § 2-124. Any use by a political organization so that it is likely to cause confusion of voters may be enjoined in an action brought in New York Supreme Court. *Id.*; *see e.g.*, *Chambers*, 58 N.Y.S.2d at 643. Particularly where there is a mechanism in place to decide disputes as to the entitlement of a political organization to the use of a particular name, this Court should not permit the invasion of a province of the states under the guise of Congress' powers to regulate commerce. Where New York election law is the only method by which a contest may be waged between members of a party for its control, *Chambers*, 58 N.Y.S.2d at 642, this Court should not let a

foot race to the Patent and Trademark Office determine the outcome.

And it is respectfully submitted that the circulation of nominating petitions is not a service within the meaning of the Lanham Act and that it is not economic activity that substantially affects interstate commerce.

The Court of Appeals rejected defendants' arguments which asked the court to take a narrow view of the term "services" as it is used in the Lanham Act. The Court of Appeals, however, took a broad view of the term "services" finding that the Lanham Act has been applied "to political organizations engaged in activities virtually identical to UWSANY's, over assertions of the same argument advanced here." 128 F.3d at 90. The Court cited *Brach Van Houten Holding, Inc. v. Save Brach's Coalition for Chicago,* 856 F.Supp. 472 (N.D. Ill. 1994) as an example. 128 F.3d at 90.

However defendants find *Save Brach's* inapposite. There, the litigants were a candy company and a not-for-profit organization formed to advocate against the relocation of a factory. *Save Brach's*, 856 F.Supp. at 474. While the activities of the not-for-profits may be characterized as political organizations, the similarities between that case and the present one end there. There was no state electoral activity in *Save Brach's*. Here, defendants were engaged in pure state electoral activities. In New York, a political organization obtains recognition as a political party when it obtains enough signatures to place a candidate on the ballot for the gubernatorial election and when that candidate obtains at least 50,000 votes in the general election for governor. *See* N.Y. Election Law §§ 1-104(3); 6-138. Here, the District Court enjoins defendants from circulating nominating petitions for a candidate for governor under the party name United We Stand, America New York. It is respectfully submitted that when

the federal court entered an injunction against defendants' activities involving circulating nominating petitions, the federal court was insinuating itself into the affairs of the State and was ignoring State election laws controlling use of party names.

Furthermore, the Court of Appeals mischaracterized defendants' activities as "endorsing" candidates. Actually political party organizations "select," "designate" and "nominate" candidates. Endorsements are for non-players. This distinction, as well as the distinction between "political" and "electoral" activities is critical. However, the Court of Appeals failed to appreciate this distinction.

Furthermore, the regulation of state electoral activities is a matter so deeply entwined with the notion of sovereignty itself that when a federal court enjoins state electoral activities it is trampling on the state's rights and the statutory rights of the people of the state to engage in the democratic process as set forth in state election laws. It is respectfully submitted that this may be violative of the Tenth Amendment of the U.S. Constitution. First Amendment arguments may also be advanced where selection of a party name involves issues of political expression.

II. The Petition Should Be Granted Because the United States Court of Appeals for the Second Circuit Has Entered a Decision in Conflict with a Decision of a District Court in the Eleventh Circuit on a Matter of Great Importance - Whether Engaging in State Electoral Activity by Circulating Nominating Petitions Is a Service Within the Meaning of the Lanham Act.

The decision of the Court of Appeals is at odds with the decision of the United States District Court for the Southern District of Florida on the question of whether circulating petitions for a state

election is a service within the meaning of the Lanham Act. The Court of Appeals essentially held, without saying, that circulating nominating petitions for a state gubernatorial election is a service within the meaning of the Lanham Act, 129 F.3d at 48, and the court affirmed a grant of injunctive relief against circulation of petitions by defendants. *Id.* The United States District Court for the Southern District of Florida, in *Tax Cap Committee v. Save Our Everglades, Inc.*, 933 F.Supp. 1077 (S.D. Fla. 1996), held that circulating ballot initiative petitions for a statewide election is not a service within the meaning of the Lanham Act, *id.* at 1078, and the court dismissed the complaint which sough, *inter alia*, injunctive relief pursuant to the provisions of the Lanham Act. *Id.*

As with many election cases, the issues raised in *Tax Cap* were moot prior to the time of appellate review. The *Tax Cap* case did not reach the Court of Appeals for the Eleventh Circuit. Nonetheless, the issues raised in this case are capable of repetition, but may evade review because of the nature of election litigation. This does not mean that the citizens of the several states should be unsure whether party name selection is subject to the Lanham Act and its prohibitions against trade and service mark infringement. At the present time they may obtain different results in different parts of the country.

In *Tax Cap* the court was dealing with trade dress infringement. *Id.* At 1078. Here, the issue of party name selection is at issue. Regardless, whether litigants may avail themselves of federal court and invoke the protections of the Lanham Act against persons and organizations engaged in state electoral activity is a question of great importance that remains unsettled.

There also exists another case which, while not a state elec-

tion law case, is a case involving a union election. In *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Center*, 914 F.Supp. 651 *aff'd on other grounds* 103 F.3d 196 (1st Cir. 1996) the court held that vying for workers votes in a union organizing election is not a service rendered in commerce within the meaning of the Lanham Act. *Id.* at 655. The diverse opinions of these various courts on the question of whether electoral activity is "commerce" or whether engaging in electoral activity is a "service" within the meaning of the Lanham Act leaves much room for doubt - doubt that should not exist on a matter so fundamentally important to the administration of elections.

The Court of Appeals also disapproved of defendants' argument that the broad interpretation given to the word "services" by the court ignores the command of the statute, 15 U.S.C. § 1114(1)(a), that such services must be rendered "in commerce." 128 F.3d at 92. The Court of Appeals stated that "commerce" as used in this statute, referred to the scope of Congress' authority to legislate on matters affecting interstate commerce and that it did not evince an intent by Congress to limit the Act's application to profit-making activity. *Id.*

Defendants contend that this feeds back into its other argument. In light of *Lopez*, and where the Lanham Act, by its terms, reaches only activities that may be lawfully regulated by Congress pursuant to the Commerce Clause, that in each instance the Court must determine whether the act and actor for which injunctive relief is sought is engaged in economic activity substantially affecting interstate commerce. *Lopez*, 514 U.S. at 559.

Put another way, where the statutory grant of jurisdiction of the Lanham Act (15 U.S. C. 1114) may not exceed constitutional limitations on the power of Congress to regulate trade and service

marks under its Commerce Clause powers, and where the Lanham Act reaches and is coincident with the constitutional boundary embodied in the Commerce Clause, the Lanham Act may only reach economic activity that substantially affects interstate commerce. Defendants contend that simple logic demands the results requested.

CONCLUSION

Circulating nominating petitions is pure electoral activity. In no way may it be considered economic activity. In fact, it is a crime in New York to mix voting and commerce. It is illegal to sell your vote. N.Y. Election Law §§ 17-102(7); 17-142(1); 17-144(1). There should be a wall between elections and commerce. The decision appealed from failed to see it that way. Accordingly, on this important question concerning state electoral rights and the Lanham Act, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 96-9500

August Term 1996
(Argued: June 3, 1997 Decided: October 15, 1997)

United We Stand America, Inc., a D.C. Corporation,
Plaintiff-Counterdefendant-Appellee,
v.
United We Stand, America New York, Inc., a New York Corporation,
Defendant-Appellant,
and
Alex Rodriguez, individually and d/b/a United We Stand, America New York, Inc.,
Defendant-Counterclaimant-Appellant.

Before: MESKILL, JACOBS, and LEVAL, Circuit Judges

Appeal from decision of the United States District Court for the Southern District of New York (Knapp, J.), granting plaintiff's motion for summary judgment against defendant Alex Rodriguez, denying defendant United We Stand America, New York, Inc.'s motion to vacate default judgment against it, and enjoining defendants' use of plaintiff's registered service mark. Affirmed.

THOMAS J. HILLGARDNER, Flushing, N.Y. (Hillgardner & Hansen, Flushing, N.Y.) for Defendants-Counterclaimant-Appellants.

LORETTA M. GASTWIRTH, Mineola, N.Y. (Meltzer, Lippe, Goldstein, Wolf & Schlissel, PC., Mineola, N.Y., Kim J. Askew, Craig W. Budner, David J. Schenk, Hughes & Luce, L.L.P., Dallas, TX.) for Plaintiff-Counterclaimant-Appellee.

LEVAL, Circuit Judge:

United We Stand America, Inc. ("United") brought this action to enjoin the use of its registered service mark "United We Stand America" by defendants United We Stand, America New York, Inc. ("UWSANY") and Alex Rodriguez. The district court entered default judgment against UWSANY after its failure to appear, and granted summary judgment in favor of plaintiff United against Rodriguez. UWSANY's motion to vacate the default was denied.

Both defendants appeal. UWSANY argues that its default should have been vacated under Fed. R. Civ. P. 60(b) because it was due to "excusable neglect." Both defendants contend that (I) their political activities are not "services" within the meaning of the Lanham Act, 15 U.S.C. § 1114(1)(a), so that their use of plaintiff's mark in connection with their activities does not violate the Act; (ii) their use of the mark is entirely intrastate and is therefore not within the reach of the Commerce Clause or the Lanham Act; and (iii) their use of plaintiff's mark in their political activities is protected by the First Amendment. We reject these arguments and affirm the judgment of the district court.

Background

"United We Stand America" (the "Mark") was a service mark initially used by the principal campaign committee for Ross Perot's 1992 presidential campaign. The Perot committee actively used the Mark in New York and on a national basis from August 1992 onward. Perot's campaign committee established the plaintiff corporation United and, shortly after the 1992 election, assigned its rights in the Mark to the plaintiff. United immediately filed with the Patent and Trademark Office for registration, which became effective in 1994.

Defendant Rodriguez worked with the Perot campaign in New York in 1992 and was aware of its use of the Mark as its slogan. After friction and division among Perot's New York supporters, Rodriguez incorporated UWSANY in October 1992, and became its president. Rodriguez caused UWSANY to use the Mark in connection with its political activities.

In June 1994, United filed a complaint against UWSANY and Rodriguez charging infringement of its Mark. The amended complaint alleges claims of infringement and unfair competition under the Lanham Act, 15 U.S.C. §1051 et seq., common law infringement and unfair competition under New York law, and violations of N.Y. Business Law §§133 and 368-d.

Although UWSANY appeared through counsel on July 1, 1994, its attorney was not retained to represent UWSANY in this matter and immediately withdrew. UWSANY was ordered to retain counsel by August 15, 1994, or face default judgment. On August 15, UWSANY appeared through counsel. However, the attorney moved to withdraw two days later. The district court allowed his withdrawal when the attorney explained that he had a physical disability which made it impossible for him to represent UWSANY, that he had told this to UWSANY before appearing, and that UWSANY had assured him it would immediately hire substitute counsel. On June 7, 1995, the district court entered a default judgment against UWSANY because it had "failed to retain counsel after repeated orders by the Court to do so" and, as a result, had failed to enter a timely answer to the complaint.

UWSANY subsequently retained counsel and, in October 1995, sought to vacate the default judgment. The motion was referred to Magistrate Judge Dolinger, who recommended that the

motion be denied. The magistrate judge found that UWSANY failed to show "excusable neglect," Fed. R. Civ. P. 60(b), and, further, that it had not proceeded in good faith. In addition, he ruled that UWSANY had failed to show a meritorious defense and that United would be unfairly prejudiced by a decision to vacate the default. The district court adopted the magistrate judge's findings and recommendations, and denied UWSANY's motion to vacate the default judgment.

In the interim Rodriguez filed a counterclaim charging United with obtaining its service mark registration by fraud. United moved for summary judgment against Rodriguez. In a report dated April 29, 1996, Magistrate Judge Dolinger recommended that summary judgment be granted in favor of United both on its own claims and on Rodriguez's counterclaim. Rodriguez's counterclaim was to be dismissed because Rodriguez failed to show that United made misrepresentations in registering the Mark. Summary judgment was to be granted in favor of United on its claims against Rodriguez because he raised no valid defense. The district court adopted Magistrate Judge Dolinger's recommendation in full and granted summary judgment in United's favor.

Discussion

UWSANY challenges the denial of its motion to vacate default judgment against it. Under Fed. R. Civ. P. 60(b), default judgment may be vacated upon a showing of "excusable neglect." In evaluating "excusable neglect," courts generally consider "(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the leval of prejudice that may occur to the non-defaulting party if relief is granted." American Alliance Ins. Co., Ltd. v. Eagle Ins. Co., 92 F.3d 57, 59 (2d Cir. 1996). The dis-

trict court denied UWSANY's motion to vacate based on its findings, inter alia, that default was willful and that UWSANY had failed to show a meritorious defense to the charges against it. We review this decision for abuse of discretion. Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 243 (2d Cir. 1994).

UWSANY argues that its default was not willful because it resulted solely from its financial inability to retain counsel. There was, however, substantial evidence supporting the magistrate judge's conclusion, adopted by the district court, that UWSANY's efforts to obtain counsel were a disguise for stalling tactics and that it lacked candor in reporting these efforts to the district judge. Despite its representations that it was attempting to retain an attorney, UWSANY took no steps to do so until the court issued an order threatening default. It then procured the appearance of an attorney who it knew was physically unable to carry out the representation and intended to withdraw immediately; the district court characterized UWSANY's conduct as "a sham effort . . . to avoid the previously imposed deadline to obtain counsel." During the fifteen-month period in which UWSANY purportedly attempted to retain counsel, it contacted only a handful of attorneys. The magistrate judge concluded that the apparent effort to retain counsel was in fact dissimulation, and the district court agreed. We find no error in this conclusion.

Moreover, we agree with the district court, for reasons discussed below, that UWSANY and Rodriguez have not demonstrated a meritorious defense to the charges against them.

1. UWSANY's political activities are "services" within the meaning of the Lanham Act.

Appellants contend that UWSANY's political activities, in connection with which it used the Mark, were not "services" within

the meaning of the Lanham Act, and that their conduct was, therefore, not within the Act's prohibition. Section 1114(1)(a) bars unauthorized use of a mark in commerce . . . in connection with the sale, offering for sale, distribution, or advertising of any goods or services [if] . . . such use is likely to cause confusion . . . .
15 U.S.C. §1114(1)(a) (emphasis added).

The term "services" has been interpreted broadly. As the court explained in N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educ. Fund, the right to enjoin infringement of a trade or service mark "is as available to public service organizations as to merchants and manufacturers." 559 F. Supp. 1337, 1342 (D.D.C. 1983) (citation omitted), rev'd on other grounds, 753 F.2d 131 (D.C. Cir.), cert. denied, 472 U.S. 1021, 105 S. Ct. 3489 (1985). In support of this view, McCarthy comments that "retention of a distinct identity [by a non-profit organization that sells no goods] is just as important as it is to a commercial company." 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §9:5 (4th ed. 1996). The protection of the trademark or service mark of non-profit and public service organizations requires that use of the mark by competing organizations be prohibited.

The Lanham Act has thus been applied to defendants furnishing a wide variety of non-commercial public and civic benefits. See, e.g., Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity, 654 F. Supp. 1095, 1101 (D.N.H. 1987) (membership in collegiate Greek-letter fraternity and solicitation of alumni contributions); American Diabetes Ass'n, Inc. v. Nat'l Diabetes Ass'n, 533 F. Supp. 16, 20 (E.D. Pa. 1981) (solicitation of donations), aff'd, 681 F.2d 804 (3d Cir. 1982); United States Jaycees v. Philadelphia Jaycees, 490 F. Supp. 688, 691 (E.D. Pa. 1980) (public service projects in-

cluding Special Olympics, Christmas shopping for orphans, and half-way houses), rev'd on other grounds, 639 F.2d 134 (3d Cir. 1981); United States Jaycees v. San Francisco Junior Chamber of Commerce, 354 F. Supp. 61, 64, 65 (N.D. Cal. 1972) (meetings, competitions, and other special events for young men interested in community affairs; community betterment programs), aff'd, 513 F.2d 1226 (9th Cir. 1975).

Indeed, the Lanham Act has been applied to political organizations engaged in activities virtually identical to UWSANY's, over assertions of the same argument advanced here. In Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago, the court held that a group engaged in soliciting donations, preparing press releases, holding public meetings and press conferences, and organizing on behalf of its members' interests was performing "services" within the meaning of the Lanham Act. 856 F. Supp. 472, 475-76 (N.D. Ill. 1994). Similarly, in Committee for Idaho's High Desert v. Yost, the court held that a non-profit organization engaged in dissemination of information about environmental causes via news releases, newsletters, and public advocacy was entitled to Lanham Act protection for its trade name even if it did not "place products into the stream of commerce." 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), aff'd, 92 F.3d 814 (9th Cir. 1996).

UWSANY was incorporated "to solicit, collect and otherwise raise money" in support of the presidential candidacy of Ross Perot. Since its incorporation, it has engaged in political organizing; established and equipped an office; solicited politicians to run on the UWSANY slate; issued press releases intended to support particular candidates and causes; endorsed candidates; and distributed partisan political literature. These are the services characteristically rendered

by a political party to and for its members, adherents, and candidates. Although not undertaken for profit, they unquestionably render a service. We have no doubt that they satisfy §1114(1)(a)'s requirement that the mark be used in connection with goods or services.

A political organization that adopts a platform and endorses candidates under a trade name performs the valuable service of communicating to voters that it has determined that the election of those candidates would be beneficial to the objectives of the organization. Thus voters who support those objectives can support the endorsed candidates with some confidence that doing so will advance the voters' objectives. If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name. Any group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. The resulting confusion would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names.[1] The suggestion

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[1] We imply no restriction on the right of members of a political party to adopt nonconfusing, related tradenames, such as "Democrats for Jones."

that the performance of such functions is not within the scope of "services in commerce" seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system. See Tomei v. Finley, 512 F. Supp. 695, 698 (N.D. Ill. 1981) (preliminary injunction issued because of strong likelihood of confusion resulting from political party's use of acronym designed to deceive voters into thinking the candidate was of the opposing political party).[2]

UWSANY relies heavily on Lucasfilm Ltd. v. High Frontier, 622 F. Supp. 931 (D.D.C. 1985), where the court suggested that "[p]urveying points of view is not a service" contemplated by the Lanham Act. Id. at 934. We disagree with this portion of the court's discussion in Lucasfilm. That suit was brought by the creator of the Star Wars film trilogy and owner of the Star Wars mark. Claiming harmful dilution of its mark, the plaintiff sought to prevent public interest groups from using the term Star Wars to identify the Reagan Administration's Strategic Defense Initiative. The court dismissed the complaint. Observing that relief depended on a showing that the defendants were using plaintiff's mark in connection with the sale of goods or services in commerce, the court found that defendants were "not engaged in selling anything but ideas," that their use of plaintiff's mark was part of an "attempt to persuade the public of their . . .

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[2] But see Tax Cap Committee v. Save Our Everglades, Inc., 933 F. Supp. 1077, 1080-81 (S.D. Fla. 1996) (group which solicits signatures on voting petitions does not provide "services" under meaning of Lanham Act). We respectfully disagree with this holding of the Florida district court.

viewpoints," and that this was "not the type of use that the laws against trademark infringement and unfair competition are designed to restrict." Id. The court went on to observe that "[d]efendants' only activity is trying to communicate their ideas. Purveying points of view is not a service." Id.

Defendant also relies on L.L. Bean Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir.), cert. denied, 483 U.S. 1013, 107 S. Ct. 3254 (1987), which followed the Lucasfilm analysis. L.L. Bean involved an effort by the famous catalogue seller of Maine woods outdoor gear to enjoin distribution of a magazine's parody of the L.L. Bean catalogue which, under an intentionally similar mark and trade dress, pretended to offer "Back-to-School-Sex" products by illustrations showing nude models using the products in provocative poses. Noting that the defendant's publication was intended solely as humorous parody of the plaintiff and in fact offered nothing for sale, the court found defendant used plaintiff's mark "solely for noncommercial purposes" and that its "parody constitutes an editorial or artistic, rather than a commercial, use of plaintiff's mark." 811 F.2d at 32.

As for Lucasfilm, we respectfully suggest that the court reached the right result but did not correctly describe the reason. If the court were right that communicating ideas and purveying points of view is not a service subject to the controls established by trademark law, then one who established a learning center would be free to call it Harvard or Yale University. We do not think the Lucasfilm court intended such a rule. In our view, the justification for denial of relief in that case lay in the fact that the defendants were using plaintiff's mark not in a manner that would create confusion as to source, but rather as part of a message whose meaning depended on

reference to plaintiff's product. In describing the SDI as "Star Wars," the defendants intended to communicate the message that the Pentagon planners of SDI were spending the nation's money and risking its security in a fantasy-driven quest comparable to plaintiff's films. Thus the point was not so much that the defendants were broadly engaged in disseminating ideas, which would not take them outside the scope of the trademark laws, but that they were using plaintiff's mark as an integral part of the idea being expressed. And, defendants' use created no confusion as to the source or origin. Furthermore, even if plaintiff suffered some trademark dilution, defendants' right under the First Amendment to use plaintiff's mark to communicate the message might prevail over plaintiff's rights under the trademark law to avoid all dilution. See Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989); Yankee Publishing Inc. v. News America Publishing, Inc., 809 F. Supp. 267, 275-76 (S.D.N.Y. 1992).

In L.L. Bean, we think the court could not have meant that "editorial or artistic" and "commercial" are mutually exclusive categories, and that the use of a mark in connection with humorous publication cannot be an infringement. Most editorial, artistic, and humorous works are sold in commerce. The point was rather that the defendant's use of plaintiff's mark was an integral part of the humorous message. It poked fun at the plaintiff, but did not cause consumer confusion as to source or origin. The reasons that permit such unauthorized use are ultimately the same as the reasons that permit a critic to use trademarks in writing that Brand A batteries last longer than Brand B, or that X-Brand cameras function better

than Y-Brand.[3]

We think these cases, therefore, do not help UWSANY. To the extent that their language may seem to support defendant's position, we reject that language. The crucial difference between this case and those is that UWSANY, unlike the defendants in Lucasfilm and L.L. Bean, is using the Mark not as a commentary on its owner, but instead as a source identifier. UWSANY's use of the Mark seeks to identify UWSANY as part of the same political organization or party as United -- the party that championed the Perot candidacy. That is a use of the Mark in connection with "services," 15 U.S.C. § 1114(1)(a), and is covered by the Lanham Act.

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[3] A similar confusion is present in International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr., 914 F. Supp. 651 (D. Me.), aff'd on other grounds, 103 F.3d 196 (1st Cir. 1996). In that case, the plaintiff union challenged the defendant employer's right to use the union's logo in antiunion literature simulating bills for union dues. The district court denied relief, following L.L. Bean and Lucasfilm. Id. at 654-56. While the court's reasoning concludes that vying for the workers' votes is not commerce and is therefore not subject to the Lanham Act, we doubt the court would have adhered to this position if the employer had circulated bogus documents under the union's letterhead that tried to mislead recipients into believing they came from the union. There was, however, no such risk. The documents circulated by the employer using the union's logo were the functional equivalent of a letter from the employer saying, "If you vote in this union, you will have to pay a lot of money in dues." The employer had a perfect right to disseminate that message notwithstanding use of the union's logo in doing so. In this crucial respect, that use is fundamentally different from ours.

2. UWSANY's use of the Mark is "in commerce."

UWSANY argues that this interpretation of "services" ignores the specification of § 1114(1)(a) that the use prohibited must be "in commerce." We disagree with its reading of the statute. The history and text of the Lanham Act show that "use in commerce" reflects Congress's intent to legislate to the limits of its authority under the Commerce Clause, rather than to limit the Lanham Act to profit-seeking uses of a trademark.

In 1879, the Supreme Court struck down a federal trademark law because it could not "find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes." Since the reach of the statute was not explicitly limited within the confines of Congressional power, the statute was found to be invalid. The Trademark Cases, 100 U.S. 82, 96 (1879). The next trademark statute enacted in 1905, therefore, prohibited unauthorized use of a registered trademark "in commerce among the several States, or with a foreign nation, or with Indian tribes," language obviously intended to track the terms of the Commerce Clause. Law of Feb. 20, 1905, ch. 592, § 16, 33 Stat. 724, 728.

The Lanham Act, enacted in 1946, prohibited unauthorized "use" of a trademark "in commerce." Lanham Act, July 5, 1946, ch. 540, § 32, reprinted in 1946 U.S.C.C.A.N. 412, 421. The current version of 15 U.S.C. § 1127 provides, in language unchanged since 1946, that "[t]he intent of this chapter is to regulate commerce within the control of Congress . . . ." It also asserts that "'commerce' means all commerce which may lawfully be regulated by Congress." The Senate Committee on Patents stated, in its report accompanying the Lanham Act, that "[t]here can be no doubt under the recent decisions

of the Supreme Court of the constitutionality of a national act giving substantive . . . rights in trade-marks in commerce over which Congress has plenary power . . . ." S. Rep. No. 79-1333 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1277. It appears that "use in commerce" denotes Congress's authority under the Commerce Clause rather than an intent to limit the Act's application to profitmaking activity. See Planned Parenthood Federation of America, Inc. v. Bucci, No. 97 Civ. 0629, 1997 WL 133313, at *4 (S.D.N.Y. March 24, 1997) ("Notwithstanding its jurisdictional 'in commerce' requirement, Section 1114 contains no commercial activity requirement.").

Nor is there merit to UWSANY's contention that, because its activity is conducted wholly within the State of New York, it cannot be considered to come within Congress's power to regulate "Commerce . . . among the several states." U.S. Const., Art. I, Sec. 8, Clause 3. We rejected similar arguments in Franchised Stores of New York, Inc. v. Winter, 394 F.2d 664, 670 (2d Cir. 1968), and Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959). We observed in Dawn Donut that Congress's power to protect a plaintiff's mark used in interstate commence necessarily implies the power to regulate a defendant's unauthorized use of the mark within a state's borders. "If a registrant's right to employ its trademark were subject within every state's borders to preemption or concurrent use by local business, the protection afforded a registrant by the Lanham Act would be virtually meaningless." 267 F.2d at 365. UWSANY does not (and cannot) contend that United does not use its mark interstate. Nor does United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995), call for any different view. See United States v. Genao, 79 F.3d 1333, 1337 (2d Cir. 1996).

3. UWSANY's use of the Mark is not protected by the First Amendment.

We reject UWSANY's further contention that its use of United's Mark is protected by the First Amendment. UWSANY is not using the phrase "United We Stand America" for an expressive purpose such as commentary, comedy, parody, news reporting or criticism, see L.L. Bean, 811 F.2d at 32; Yankee Publishing, 809 F. Supp. at 276, but instead as a means to associate itself with the political movement that sponsored the Ross Perot campaign. In other words, it is using the slogan as a mark, and using it to suggest the same source identification as plaintiffs. This is precisely the use that is reserved by the Lanham Act to the owner of the mark. Even assuming that UWSANY might communicate its political message more effectively by appropriating United's Mark, such appropriation would cause significant consumer confusion.[4] It is not protected by the First Amendment. See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 541 & n.19, 107 S. Ct. 2971, 2983 & n.19 (1987). To allow UWSANY to use United's Mark would not only cause confusion, but would permit it to "'appropriat[e] to itself the harvest of those who have sown.'" Id. at 541, 107 S. Ct. at 2983 (quoting International News Service v. Associated Press, 248 U.S. 215, 239-40, 39 S. Ct. 68, 72 (1918)).

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[4] Nothing in this opinion is intended to bar use of another's mark to communicate a message about the trademark holder in a manner which avoids the creation of consumer confusion. See, e.g., Save Brach's, 856 F. Supp. at 476.

4. Timeliness.

UWSANY's final claim is that United cannot enforce its service mark rights because it registered its service mark only after UWSANY's incorporation. This misunderstands the primary function of registration, which is to give notice. The owner's right to bar infringing use does not depend on registration prior to the infringer's use. As United was the first user of the Mark, and UWSANY was well aware of United's prior use before UWSANY used it, the date of United's registration is irrelevant to the dispute. See Basile, S.p.A. v. Basile, 899 F.2d 35, 37 n.1 (D.C. Cir. 1990).

* * *

We conclude that UWSANY's motion to vacate the default judgment was properly denied and that summary judgment was properly granted in United's favor against Rodriguez.

Conclusion

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 96-9500

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2 day of December one thousand nine hundred and ninety-seven,

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United We Stand America

Plaintiff-Counter-Defendant-Appellee

v.

Rodriguez

Defendant-Counter-Claimant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant United We Stand, America New York, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It Is Further Noted That the Suggestion for Rehearing in Banc Has Been Transmitted to the Judges for the Court in Regular Active Service and to Any Other Judge That Heard the Appeal and That No Such Judge Has Requested That a Vote Be Taken Thereon.

FOR THE COURT

GEORGE LANG III, Clerk

By: S/ Beth J. Meador,

Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
94 Civ. 4690 (WK)

UNITED WE STAND AMERICA, INC., a D.C. Corporation
Plaintiff,

-against-

UNITED WE STAND, AMERICA, NEW YORK, INC.,
a New York Corporation, and
ALEX RODRIGUEZ, individually and d/b/a UNITED WE STAND,
AMERICA, NEW YORK, INC.,
Defendant

OPINION AND ORDER

WHITMAN KNAPP, SENIOR D.J.

Before us is an action brought by plaintiff United We Stand America (hereinafter "plaintiff") for infringement and false designation under the Lanham Act, 15 U.S.C. §§ 1114, 1125, against defendant United We Stand, America New York (hereinafter "defendant UWSANY") and defendant Alex Rodriguez (hereinafter "defendant Rodriguez") to enjoin use of plaintiff's registered service mark "United We Stand America".

The plaintiff filed a motion for summary judgment against defendant Rodriguez. Defendant UWSANY filed a motion to vacate default judgment entered against it for failure to answer or otherwise move against the complaint, having asserted that it had been unable to get a lawyer to represent it. Magistrate Judge Michael H. Dolinger has filed a Report and Recommendation recommending that we grant

plaintiff's motion for summary judgment (the "April 29 Report"), and a Report and Recommendation recommending that we deny defendant UWSANY's motion to vacate the default judgment (the "May 2 Report").

Having reviewed the two Reports de novo and listened to the parties' oral arguments, we find that only one question demands further examination: whether the defendants, through their New York incorporated political organization, provide a "service" within the meaning of the Lanham Act.[5] We find this to be a close question. The Lanham Act in several places confines its application to persons who are engaged in offering for sale or distribution "goods or services." See 15 U.S.C. §§ 1111 et. seq. Defendants persuasively argue that, under the doctrine of eusdem generis, the meaning of "services" should be colored by its constant association with the word "goods."

Plaintiff's citation of Jund v. Town of Hempstead (2d Cir. 1991) 941 F.2d 1271, 1285, in no way refutes this argument. Federal jurisdiction in that case was based on the Hobbs Act, 18 U.S.C. § 1951(a). Unlike Lanham, the Hobbs Act says nothing about "goods"or "services" but outlaws interference with commerce "in any way or degree." See Jund, 941 F.2d at 1285.

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[5] To prevail on an infringement claim under the Lanham Act, the plaintiff must demonstrate that defendants used in commerce, without the plaintiff's consent, a "reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services . . ..l 15 U.S.C. § 1114(1)(a) (emphasis added).

However, a purview of similar cases brought under the Lanham Act demonstrates that the word "services" has been quite broadly interpreted. It has not been "limited to commercial enterprise. It is as available to public service organizations as to merchants and manufacturers." See, e.g., N.A.A.C.P. v. N.A.A.C.P. Leg. Defense Fund (D.D.C. 1983) 559 F.Supp. 1337, 1342, rev'd on other grounds (D.C. Cir. 1985) 753 F.2d 131. In that case, the plaintiff N.A.A.C.P. [The National Association for the Advancement of Colored People] back in 1939, caused the incorporation of the defendant The Legal Defense Fund. The reason for this was that plaintiff had for a long time been engaged in political activity in pursuit of its named objective. Being thus engaged in political activity, no one contributing to its activities could claim a charitable tax deduction. But under the leadership of its counsel Thurgold Marshall it was beginning in addition to its political activities to pursue its objectives by bringing lawsuits in state and federal courts It was thought — correctly as it turned out — that if Mr. Marshall's activities were performed by a separate entity (whose corporate name was "The Legal Defense Fund") contributions to such entity could be claimed as charitable deductions. Although it was always acknowledged that both organizations were engaged in a joint venture (the "advancement of colored people") and despite the fact that plaintiff had specifically authorized the defendant to append the initials N.A.A.C.P. to its corporate name, the Internal Revenue Service never claimed that contributions to defendant were not tax deductible.

So matters stood for many years. The two organization were legally separate but jointly managed, and everybody was happy. But with the passage of time the founders of both organizations departed, either through death or the pursuit of other interests. Mr. Marshall,

for example, became successively a United States Circuit Judge, Solicitor General, and Supreme Court Justice. The result was independent management for the two entities, antagonism and ultimately the lawsuit under discussion.

Although by no stretch of the imagination could it be said that either organization was engaged in rendering any sort of commercial services, the District Court found that injunctive relief was appropriate because the public "is likely to believe that [defendant's] services come from the same source, or are affiliated with the [plaintiff]. Nor is the right to enjoin an infringement limited to commercial enterprise. It is as available to public service organizations as to merchants and manufacturers." N.A.A.C.P. 559 F.Supp. at 1342 (emphasis added, citations omitted). The Court of Appeals in reversing "on other grounds" (latches on plaintiff's part) actually approved the above quoted reasoning. Had it done otherwise, it would have had no occasion to reach the question of latches.

Other courts, faced with similar situations have found that the Lanham Act applies to non-commercial organizations "engaged in soliciting donations, preparing press releases, holding public meetings and press conferences, propounding proposals" for the furtherance of a non-commercial ideological goal. See. e.g., Brach Van Houten Holding. Inc. v. Save Brach's Coalition for Chicago (N.D.Ill. 1994) 856 F.Supp. 472, 475-76; United States Jaycees v. San Francisco Junior Chamber of Commerce (N.D.Cal. 1972) 354 F.Supp. 61, aff'd, (9th Cir. 1975) 513 F.2d 1226; United States Jaycees v. Philadelphia Jaycees (E.D.Pa. 1978) 490 F.Supp. 688, 691 (defendant's activities involved organizing and holding meetings for young men interested in the affairs and improvement of their communities, with the purpose of fostering interest in the community

betterment programs), vacated & remanded on other grounds, 639 F.2d 134 (3rd Cir. 1981) (finding that district court's refusal to enjoin defendant's use of plaintiff's registered mark to be error, and thereby implicitly affirming application of the Lanham Act to defendant's activities).

Moreover, the courts have not limited themselves to instances where the "service" provided is clearly defined. In American Diabetes Ass'n v. National Diabetes Ass'n (E.D.Pa. 1981) 533 F.Supp. 16, 18, the court found jurisdiction under the Lanham Act, though at the time of the action "defendants [had] only solicited funds and [had] not provided any services with these funds." See also Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity (D.N.H. 1987) 753 F.Supp. 1095, 1102 (applying Lanham Act to activities of an unincorporated college fraternity where "service" provided was unclear and defendant's sole activity "in commerce" was soliciting donations from alumni).

We have found one case which at first glance appears to warrant a contrary conclusion, LucasFilm Ltd. v. High Frontier (D.D.C. 1985) 622 F.Supp 931, 935. There, Judge Gesell stated that "[t]he court cannot venture beyond the property protections provided by the trademark laws and attempt to regulate the terms of public debate." However, Judge Gesell actually based his decision on the fact that the defendants had "not used the phrase as a title for their organization or propaganda campaign in a way that might create confusion among contributors or supporters," Id. at 934. Thus, Judge Gesell's decision, in contrast with his dicta, is consistent with the other decisions we have cited.

As we above indicated, we found defendants' argument persuasive, and if writing on a clear slate we might have adopted it.

However, having found seven district courts and three circuit courts (N.A.A.C.P - D.C.Cir. San Francisco Jaycees - 9th Cir., Philadelphia Jaycees - 3rd Cir.) refuting it, and none supporting it, we feel ourselves constrained also to reject it.

As we previously indicated, we reviewed the remaining issues de novo., and found no reason to expound upon or disagree with Magistrate Judge Dolinger's highly reasonable conclusions. Accordingly we adopt in their entirety without opinion his Reports and Recommendations dated April 29 and May 2. We grant summary judgment to the plaintiff as against defendant Rodriguez, and deny defendant UWSANY's motion to vacate the default judgment.

SO ORDERED.

New York, New York

October 9, 1996

s\WHITMAN KNAPP,

SENIOR U.S.D.J.